No. 12371.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

F. E. THIBODO,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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Preface.

Most of the argument presented by the Government are fully covered in appellant's opening brief. We will proceed to discuss any new points presented after first calling to some erroneous statements of fact.

Misleading Statements of Fact.

At pages 2, 10 and 13 of appellee's brief it is asserted that plaintiff does not contend that he did not have actual knowledge of the condemnation proceeding. It is true that plaintiff neither specifically pleaded knowledge of the existence of the condemnation suit, or lack of knowledge, unless the absence of knowledge be inferentially comprehended in the allegation: "or any other act savoring of due process of law." [Tr. p. 4.]

If the statement in the Government's brief is intended to mean that the appellant concedes that he had knowledge

of the condemnation suit, then we now assert that appellant will be able to prove that he had no knowledge of the suit until after the judgment in condemnation and the payment of the awards, but that the Attorneys for the Government at the time the suit in eminent domain was filed, knew that the bonds of plaintiff were outstanding and unpaid, and that plaintiff was the owner thereof.

Under the circumstances we attach no importance to these facts. It is a matter of common practice to omit as defendants the owners of statutory liens in the expectation that in the drafting of the judgment the amounts sufficient to satisfy the liens will be deducted. In this case it could be done in several ways, the most usual of which would be to withhold from the awards a sufficient sum to make a payment to the City Treasurer's office and thereby cancel the bonds. Therefore, we think it should clearly appear that even though a bondholder had knowledge of the suit, he could not know or assume that the condemnor did not intend to so protect itself against outstanding liens of record.

The fact that the suit brought by the Government was one to obtain title to the lands in fee simple absolute neither supports, nor detracts from, the logic of our position in this respect.

As to the need for the plaintiff to plead knowledge, or lack of it, it is the general law of all States and Jurisdictions in this land that matters of waiver and estoppel are matters of defense, and that it is unnecessary for the pleader to negative possible defenses.

We further submit that under the judgment and findings in this case [Tr. p. 21] any allegation respecting knowledge on the part of the plaintiff as to any pending suit, would have been utterly useless.

It is true that the Government in its motion to dismiss asserted that the plaintiff had notice of the pendency of the condemnation action [Tr. p. 12], but no evidence was offered or received [Tr. p. 31] and there was no finding respecting it. [Tr. p. 21.]

The nature of the findings and the judgment is such that the trial court has inferentially determined that, had the plaintiff attempted to be impleaded in the condemnation action, he would not have been entitled to be heard, to share in the compensation, or to participate in any relief. [Tr. p. 21, Finding I.] Further, the trial court, at the time of the hearing of the motion [Tr. p. 35] in effect declared that the existence of plaintiff's bonds is of no concern to the Government, and that the plaintiff was not a necessary party, nor did he have any direct interest. [Tr. p. 40.]

The position of counsel for the Government is therefore inconsistent. They rely upon a judgment which has determined that the plaintiff was not entitled to be made a party defendant, nor served with process, or to be heard in the matter of just compensation. Now they urge upon this Court of Appeals that his rights are lost because he failed to appear in the action.

The trial court in its finding declared that the plaintiff was a proper, but not necessary party. [Tr. p. 21.] When in the same finding it also determined that the plaintiff was not entitled to be heard in the matter of compensation for the property taken it adjudicated that he was neither a proper nor necessary party. His interest could thereby be destroyed under a nominal judgment of compensation and the rights guaranteed to him by the Fifth Amendment to the Constitution would be meaningless.

The Misleading Statement That the Improvement Act of 1911 Imposes on the City of National City the Duty of Collecting the Bond Fund and Paying It Out to the Bond-Holder.

On page 8 of the Government brief it is asserted that since the Improvement Act of 1911 makes the City of National City a trustee for the bond-holders in the collection and disbursement of the bond fund, and since the City was a party defendant to the condemnation action, there is a complete compliance with the law.

This statement of course is a matter of defense without anything in the record to support it, and our reply should be regarded in the same category. The court might well be reluctant to accept at face value such statements on the part of either counsel If the record is important it should be transmitted.

Under the Improvement Act of 1911, it is the *City Treasurer, not the City,* who is a trustee, in the collection and disbursement of the bond funds. He does this in an extraordinary capacity distinct from his general official duties. He was not a party to the condemnation suit. The City, as a City, was in no way obligated with respect to the bonds, and had no duties to perform concerning them. It, of course does have a supervisory control over the City Treasurer and his office, in order that the fund of the City and the Public may be protected and official duty performed. Such is the character of the litigation involved in *Municipal Bond Co. v. City of Riverside,* cited by defense counsel, and reported in 4 Cal. App. 2d 442.

The Fallacious Argument on Page 8 of the Government Brief, That While the Lien of the Assessment May Be Notice to the World, the Bond Issued Upon It Is Not.

Inasmuch as the lien of the assessment under the statute continues until it is paid, and constitutes notice to all the world, it matters not whether we say that it is the lien of the assessment, or the lien of the bond, that compelled the condemnor to take notice of our interest. This statement is in full accord with the decision of the Supreme Court of California in *Thompson v. Clark,* 6 Cal. 2d p. 285, at p. 298, 57 P. 2d 490, where it is held:

> "We have heretofore pointed out that by the terms of the Act of 1911 the issuance of bonds does not constitute payment or discharge of the assessment. The assessment is not paid in full until the bond which represents it is paid in full."

A Review of Appellee's Position and the Consequences They Contend Must Follow.

It is asserted, and confirmed by the judgment, that the plaintiff's bonds are not interests of record of which notice must be taken at any stage of a condemnation action. It is urged, *without record evidence to support it,* that plaintiff had knowledge of the eminent domain action and his rights are lost unless he intervenes. It is contended, that, although plaintiff brought his action within the six years allowed for the prosecution of a suit against the Government, he has lost his rights because he has not attempted to foreclose his bonds under the provisions of a State statute. Almost in the same breath they declare that an

action of foreclosure cannot be maintained against the Federal Government, and that the filing of the suit, the declaration of taking, the deposit, and the order of immediate possession vests title in the Government, at least to the extent of the interests comprehended and included. They admit that when this took place plaintiff's bonds were not affected by any statute of limitations of the State. Nevertheless they devote considerable space to the State statutes and the decisions applicable thereto, with the suggestion that we cannot preserve our lien despite the State law. (Br. p. 14.)

We are not attempting to preserve our lien despite the State law, because the law of the State is no longer applicable, and the Federal jurisdiction has attached. For the plaintiff to foreclose would be but the performance of an idle act. We are not now even dealing with a lien, in foreclosure or in any other way. We are only taking advantage of our right to sue the Government as provided by the law and the Constitution. This is the measure and the limitation of the right. We sued within the purview of this law, and we sued within the allowable time.

Since for the reasons outlined the State statute of limitation, adopted subsequent to the issuance of the bonds (App. Br. p. 14), is not a proper element of this case, we are not analyzing the court decisions relating to it. We do, however, contend that to give effect to such statute with respect to plaintiff's bonds would be to violate the Constitution of the United States.

This was not merely a case where there was no statute of limitation, and one was later adopted. The situation was that the State of California entered into a contract, as expressed in the bond, that the obligation of the bond shall remain a lien until paid. [Tr. p. 6.] Such a statute subsequently adopted would violate Article I, Section 10 of the Constitution of the United States in that it is a State law impairing the obligation of a contract.

Respectfully submitted,

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